MUTHIAH MEENAKSHI v. TAN CHU ENG & ORS

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: B-01-180-04-2013]
15 JUNE 2015

LAND LAW: *Transfer – Void instruments – Power of attorney – Whether land fraudulently transferred by deceased's purported power of attorney – Indian citizen holding power of attorney – Whether s. 433F of National Land Code permits a foreign national holding power of attorney to transfer landed property in Malaysia – Requirements of s. 68 Evidence Act 1950 and s. 3 Power of Attorneys Act 1949 – Whether established – Whether transfer void for breach of s. 433F*

This was the appellant's appeal against the decision of the High Court Judge who refused to grant declaratory orders as well as incidental relief to set aside the transfer of a piece of land to the first and second respondents executed by the fourth defendant as purported power of attorney for the deceased and to transfer it back to the appellant's name. The deceased was the owner of the said disputed land. The appellant, executrix of the deceased, claimed that the land had been, *inter alia*, fraudulently transferred to the first and second respondents by the deceased's purported power of attorney, the fourth defendant, against whom the appellant had obtained a default judgment. The fourth defendant was an Indian citizen and he was holding a power of attorney purportedly given by the deceased, and the property was transferred after the death of the deceased. The central complaint of the appellant was that s. 433F of the National Land Code ('NLC') does not permit a foreign national holding a power of attorney to transfer landed property in Malaysia. The issue that arose for determination was whether the transfer was void for breach of s. 433F of the NLC.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Section 433F(1) of the NLC says any deed or instrument executed by a non-citizen under a power of attorney in respect of any alienated land or any interest therein in favour of any person shall be void. Thus, in the instant case, it was clear that the holder of the power of attorney, the fourth defendant, was an Indian national and in consequence he would not be able to execute any instrument for transfer of property in dispute. The consequence of such transfer and registration was void and bad in law and ought to be expunged from the records of the land registry. (paras 11 & 13)

(2) The first and second respondents were relying on the power of attorney to assert that they had entered into a valid and lawful transaction. The power of attorney was purportedly executed in Chennai, India and was not marked as exhibit. There was no evidence to show that the requirement of s. 68 of the Evidence Act 1950 as well as s. 3 of the Powers of Attorney Act 1949 was established as per the law. Hence, the first and second respondents had not discharged their evidential burden taking into consideration that default judgment had been entered against the fourth defendant. The fourth defendant did not give evidence in this case. In consequence, whatever allegation that was made against the fourth defendant stood unrebutted. (paras 13, 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Hakim Mahkamah Tinggi yang enggan membenarkan perintah-perintah deklarasi serta relif-relif berkaitan untuk mengenepikan pindahmilik sebidang tanah kepada responden pertama dan kedua yang telah dilaksanakan oleh defendan keempat sebagai surat kuasa wakil bagi pihak si mati dan untuk memindah milik tanah tersebut kepada nama perayu. Si mati adalah pemilik tanah yang dipertikaikan. Perayu, wasi kepada si mati, mendakwa bahawa tanah tersebut, antara lain, telah dipindahmilik secara frod kepada responden pertama dan kedua oleh surat kuasa wakil si mati, iaitu defendan keempat, yang telah dikenakan penghakiman ingkar terhadapnya oleh perayu. Defendan keempat adalah seorang warganegara dari India dan memegang surat kuasa wakil yang dikatakan telah diberi oleh si mati, dan tanah tersebut telah dipindahmilik selepas kematian si mati. Aduan utama perayu adalah bahawa s. 433F Kanun Tanah Negara ('KTN') tidak membenarkan seorang warganegara asing yang memegang surat kuasa wakil untuk memindah milik tanah dalam Malaysia. Isu yang dibangkitkan untuk pertimbangan adalah sama ada pindahmilik adalah tidak sah kerana melanggar s. 433F KTN.

Diputuskan (membenarkan rayuan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 433F(1) KTN menyatakan bahawa apa-apa surat ikatan atau surat cara yang dilaksanakan oleh seseorang yang bukan warganegara di bawah surat kuasa wakil berkenaan dengan mana-mana tanah yang diberi hakmilik atau apa-apa kepentingan di dalamnya yang memihak kepada mana-mana individu adalah tidak sah. Oleh itu, dalam kes ini, adalah jelas bahawa pemegang surat kuasa wakil, iaitu defendan keempat, adalah seorang warganegara India dan dengan itu dia tidak boleh melaksanakan apa-apa instrumen untuk mana-mana pindahmilik tanah yang dipertikaikan. Akibat pindahmilik dan pendaftaran sedemikian adalah tidak sah dan adalah cacat dari segi undang-undang dan patut dihapuskan dari rekod-rekod pendaftaran tanah.

(2) Responden pertama dan kedua bergantung kepada surat kuasa wakil untuk menegaskan bahawa mereka telah memeterai transaksi yang sah dan mengikut undang-undang. Surat kuasa wakil dikatakan telah dilaksanakan di Chennai, India dan tidak ditandakan sebagai ekshibit. Tiada keterangan menunjukkan bahawa keperluan s.68 Akta Keterangan 1950 dan s. 3 Akta Surat Kuasa Wakil 1949 dibuktikan mengikut undang-undang. Oleh itu, responden pertama dan kedua tidak melepaskan beban pembuktian mereka dengan mengambil kira bahawa penghakiman ingkar telah dimasukkan terhadap defendan keempat. Defendan keempat tidak memberikan keterangan dalam kes ini. Akibatnya, apa-apa dakwaan yang dibuat terhadap defendan keempat tidak dipatahkan.

Case(s) referred to:

Beckwith v. R [1976] 12 ALR 333 ***(refd)***

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***

Datuk M Kayveas v. Chong Chek Ah & Ors [2011] 1 LNS 380 HC ***(refd)***

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd [2015] 1 CLJ 357 CA ***(refd)***

National Union Of Bank Employees v. Director General of Trade Unions & Anor [2014] 1 LNS 1124 CA ***(refd)***

Wakil-Wakil Diri Kepada Mahadevi Nadchatiram (deceased) v. Hong Leong Bank Bhd [2014] 1 LNS 755 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 68

National Land Code, s. 433F(1)

Powers of Attorney Act 1949, s. 3

For the appellant - MJ Ganesan (Raja Devan with him); M/s J Ganesan Tajul Anuar & Co

For the 1st & 2nd respondents - RV Lingam; M/s RV Lingam & Co

For the 3rd respondent - Ahmad Fuad Othman (Rafiqha Hanim Mohd Rosli with him); SFCs

For the 5th respondent - Mohammad Imran Adam; M/s Zufaidi & Assocs

[Appeal from High Court, Shah Alam; Civil Suit No: MT4-21-121-2004]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff (executrix) appeals against the decision of the learned High Court Judge who refused to grant declaratory orders as well as incidental relief to set aside the transfer to the first and second respondents

executed by the fourth defendant as purported power of attorney for appellant (deceased) and transfer it back to the appellant's name. The appeal was heard on 13 March 2015 and we reserved judgment. My learned brothers Vernon Ong Lam Kiat JCA and Abdul Rahman bin Sebli JCA have read the judgment and approved the same. This is our judgment.

Brief Facts

[2] The deceased RM Muthiah Chettiar was the owner of the land in dispute. The appellant, executrix of the deceased is claiming that the land has been *inter alia* fraudulently transferred to the first and second respondents by the deceased purported power of attorney, the fourth defendant against whom the appellant has obtained a default judgment and is not a respondent in this appeal.

[3] It is not in dispute that the fourth defendant is an Indian citizen and he was holding a power of attorney purportedly given by the deceased, and the property was transferred after the deceased death.

[4] The central complaint of the appellant is that the s. 433F of the National Land Code 1965 (NLC 1965) does not permit a foreign national holding a power of attorney to transfer landed property in Malaysia.

[5] What is essential to note in this case is that the parties had filed agreed facts which is found at pp. 141A to 143D of the appeal record. The learned trial judge had written a 20 page judgment without focusing on the relevant issues and discussing irrelevant matters not falling within the compass of the agreed issues by the parties.

[6] The real issue for the determination of the appeal in the instant case is related to whether the transfer is void for breach of s. 433F. The procedural and/or evidential issue which relates to the power of attorney is that - who has the burden of proving there was a valid and enforceable power of attorney given by the deceased to transfer the deceased's property, that too upon the deceased's death? In the instant case, the power of attorney was marked as ID13 and was never marked as exhibit.

[7] The appellant have filed a lengthy statement of claim and the English version runs to about 25 pages. The prayers read as follows:

> (1) A declaration that the Estate of the said Muthiah Chettiar, deceased has at all material times remained and still does remain the true owner of the subject land;
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> (2) A Declaration that the purported Power of Attorney allegedly executed by R.M. Muthiah Chettiar s/o Raman Chettiar on 23.9.1998 in favour of Arulanandu Mariaarul, the 4th Defendant and registered in the Registry of the High Court at Kuala Lumpur has at all material times remained and still do continue to remain null and *void ab initio* and of no effect;

(3) A Declaration that the purported issue of the Title in Continuation to the whole of the subject land, namely G.M. 437 for Lot No. 454, Mukim Api, District Kuala Selangor by the Pentadbir Tanah Daerah Kuala Selangor, Selangor on 5.7.1999 was at all material times and still is null and void *ab initio* and of no effect;

(4) A Declaration that the said purported Memorandum of Transfer (Form 14A) executed on 14.4.1999 by the 4th Defendant an Indian National, as the purported Attorney of Muthiah Chettiar, an Indian National, as the Transferor and also executed on 14.4.1999 by the 1st and 2nd Defendants as the Transferees and duly attested by Md. Khardee bin Md. Shaari, an Advocate and Solicitor, a partner and/or member of the 5th Defendant Firm, whereby the subject land was purportedly transferred to the 1st and the 2nd Defendants, and the registration thereof effected by the Pentadbir Tanah Daerah, Kuala Selangor, Negeri Selangor Darul Ehsan, on 2.6.1999 *vide* Jilid 344 Folio 512 - were at all material times and still are null and void *ab initio* and of no effect;

(5) An Order that the 1st and the 2nd Defendants do forthwith surrender and/or deliver the Title in Continuation No. GM. 437 to Lot No. 454, Mukim Api, District Kuala Selangor to the Pentadbir Tanah for the purpose of Pentadbir Tanah complying with the terms of the Orders to be made hereon;

(6) An Order that the Pentadbir Tanah Daerah, Kuala Selangor, Negeri Selangor Darul Ehsan, do forthwith cancel, remove and/or expunge from the relevant Register Documents of Land Titles and/or all other relevant Registers and Records and/or the said Title in Continuation, all those entries, memorials and/or endorsements made in respect of the said void and/or invalid Memorandum of Transfer mentioned in Prayer (4) hereof, to the intent that the subject land has at all material times remained and still do continue to remain duly registered under Title EMR 2412 as mentioned in Prayer (7) hereof in the name of the said "R.M. Muthiah Chettiar s/o Raman Chettiar";

(7) An Order that upon complying with the terms of the Order to be made under Prayer (6) hereof, the Pentadbir Tanah Daerah, Kuala Selangor, Negeri Selangor Darul Ehsan, do forthwith cancel the said Title in Continuation No. G.M. 437 for Lot No. 454 to the intent that the said old Issue Document of Title namely, EMR 2412 for Lot No. 454, Mukim Api, District of Kuala Selangor, Negeri Selangor Darul Ehsan, may continue to remain in force as it stood prior to 2.6.1999 unaffected in any manner whatsoever, and further the Plaintiff as the personal representative of the said Muthiah Chettiar, deceased, may be at liberty to apply for and obtain from the said Pentadbir Tanah Daerah, Kuala Selangor, Negeri Selangor Darul Ehsan, any new Title by way of replacement of the said old Issue Document of Title, EMR No. 2412 for Lot No. 454 under the provisions of the said National Land Code, 1965;

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(8) An Order that the Pentadbir Tanah Daerah, Kuala Selangor, Negeri Selangor Darul Ehsan, and/or all other Land Registering Authorities and/or all other Officers concerned do make all the relevant entries, memorials and/or endorsements in the relevant Register Documents of titles and/or other Registers of Records and/or the Issue Document of Title relating to the subject land and

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do all other things as may be necessary to give effect to the Declarations and/or Orders to be made hereon;

(9) An Order of Injunction restraining the 1st and the 2nd Defendants or their servants or agents jointly and severally from taking possession of, entering, obtaining any benefit or income from or

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transferring, selling, charging, leasing or in any other dealing with or disposing of the subject land [Title EMR 2412] until the final disposal of this Suit or until further Order of this Honourable Court;

(10) Aggravated damages and exemplary damages;

(11) Such further or other reliefs as to this Honourable Court may seem

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just; and

(12) Costs.

[8] *Chronology Of Events And Issues To Be Tried*

(a) The deceased died on 19 December 1998;

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(b) Sale and purchase agreement was executed by the first and second respondents (as purchaser) and fourth defendant (for the vendor - deceased) on 25 March 1999;

(c) The land was transferred and registered in the name of first and second

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respondents on 2 June 1999;

(d) Probate was granted to the appellant on 27 March 2000.

[9] Issues to be tried agreed between the first and second respondents read as follows:

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1. Is the purported power of attorney allegedly executed by Muthiah Chettiar s/o Raman Chettiar on 23 September 1998 in favour of Arulanandu Mariaarul a forgery and thereby is null and void, invalid, and incapable of registration and is of no effect?

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2. Was the Pentadbir Tanah wrong in law, grossly negligent, committed breaches of statutory duty and contravened the provisions of the National Land Code 1965 in issuing a new title namely GM 437 for Lot 454 Mukim Api-Api, Daerah Kuala Selangor on 5 July 1999 in place of the original title EMR 2412?

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3. Was the purported memorandum of transfer (the said memorandum of transfer) executed on 14 April 1999 by the fourth defendant as the transferor and also executed by the first and second defendants as the transferees null and void *ab initio* and of no effect?

4. Was the Pentadbir Tanah wrong in law, grossly negligent, committed breaches of statutory duties and contravened the provisions of the National Land Code 1965 in registering the said memorandum of transfer executed by fourth defendant?

5. Was the registration of the said memorandum of transfer effected by the Pentadbir Tanah Daerah Kuala Selangor on 2 June 1999 *vide* Jilid 344 Folio 512 hereby making the first and second defendants the new purported registered proprietors of the said land null and void *ab initio*, invalid, illegal and of no effect?

[10] It must be noted, *locus standi* of the appellant or the deceased as the lawful owner of the property in dispute is not one of the issue to be tried. It was plainly wrong for the learned trial judge to dwell on this issue in length in the grounds of judgment when it is not related to illegality or public policy. (See *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644).

Jurisprudence Relating To s. 433F of NLC 1965

[11] Section 433F(1) of NLC 1965 says any deed or instrument executed by a non-citizen under a power of attorney in respect of any alienated land or any interest therein in favour of any person shall be void. The said s. 433F reads as follows:

> 433F. Execution by non-citizen or foreign company under power of attorney void. [Ins. Act A941]
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> (1) Unless approval is not required under section 433B or 433E or unless a disposal of land or dealing or other act with regard to alienated land or any interest in land has been exempted under rules made under section 14, after the commencement of this section, any deed or instrument executed by a non-citizen or a foreign company under a power of attorney in respect of any alienated land or any interest therein in favour of any person or body shall be void, and, in the case of an instrument of dealing, be incapable of registration. [Am. Act A1104 - Prior text read - "(1) Subject to sections 433B and 433E, after the commencement of this section, any deed or instrument executed by a non-citizen or a foreign company under a power of attorney in respect of any alienated land or any interest therein in favour of any person or body shall be void, and, in the case of an instrument of dealing, be incapable of registration".]
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> (2) Nothing contained in this section shall render invalid any deed or instrument effected by a non-citizen or a foreign company under a power of attorney in respect of any alienated land or any interest therein in favour of any person or body before the commencement of this section and stamped in accordance with the provisions of the Stamp Act 1949 either before or within one month after such commencement.

[12] The words used by the legislature are clear and does not suffer from any ambiguity. The respondents here also did not advance any argument on the construction of s. 433F. It is trite that as a general rule, a court will adopt the construction of a statute which will give some effect to all the words which it contains unless the exception applies. (See *Beckwith v. R* [1976] 12 ALR 333; *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors* [2014] 5 CLJ 669; [2014] 6 MLJ 651; *Wakil-Wakil Diri Kepada Mahadevi Nadchatiram (deceased) v. Hong Leong Bank Berhad* [2014] 1 LNS 755; [2015] 1 MLR 333; *Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd* [2015] 1 CLJ 357; [2015] 2 MLJ 509; *National Union Of Bank Employees v. Director General of Trade Unions & Anor* [2014] 1 LNS 1124; [2014] 6 AMR 143). In *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Federal Court had this to say:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
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> > As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333.

[13] We have read the appeal record and able submissions of learned counsel. After giving much consideration to the submission of the respondents, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) In the instant case, on the face of record it is clear that the holder of the power of attorney, the fourth defendant was an Indian national and in consequence he will not be able to execute any instrument for transfer of property in dispute. The consequence of such transfer and registration is void and bad in law and ought to be expunged from the records of the land registry.

(b) As to the procedural and/or evidential issue who has the burden of proof that there was valid and enforceable power of attorney, on the facts of the case we take the view the burden lies on the first and second respondents. Our reasons *inter alia* are as follows:

(i) The appellant has obtained a default judgment against the fourth defendant. The fourth defendant did not give evidence. In consequence, whatever allegation against the fourth defendant stands unrebutted. Support for the proposition is found in a number of

cases. It was dealt in great detail in *Datuk M Kayveas v. Chong Chek Ah & Ors* [2011] 1 LNS 380; [2011] 9 MLJ 347, which judgment was affirmed by the Federal Court. (See *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949). We do not wish to repeat the same.

(ii) In the instant case, the first and second respondents are relying on the power of attorney to assert that they have entered into a valid and lawful transaction. It is not in dispute that the power of attorney was purportedly executed in Chennai, India. The power of attorney was also not marked as exhibit. There is also no evidence to show that the requirement of s. 68 of Evidence Act 1950 (EA 1950) as well as s. 3 of Powers of Attorney Act 1949 (PA 1949) was established as per the law.

Section 68 of EA 1950 reads as follows:

> 68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

Section 3(1) of PA 1949 reads as follows:

> 3. (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless -
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> (a) if executed within *Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by-
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> (i) a Magistrate;
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> (ii) a Justice of the Peace;
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> (iii) a Land Administrator;
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> (iv) a Notary Public;
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> (v) a Commissioner for Oaths;
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> (vi) an advocate and solicitor; or
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> (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in *Peninsular Malaysia and incorporated by or under any written law in force in *Peninsular Malaysia; or
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> (b) if executed outside *Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by -

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(i) a Notary Public;

(ii) a Commissioner for Oaths;

(iii) any Judge;

(iv) a Magistrate;

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(v) a British Consul or Vice-Consul;

(vi) a representative of Her Britanic Majesty;

(vii) on and after Merdeka Day, any Consular Officer of Malaysia;

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(viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or

(ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.

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[14] We are of the considered view that the first and second respondents have not discharged their evidential burden taking into consideration that default judgment has been entered against the fourth defendant and the fourth defendant did not give evidence in this case.

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[15] For reasons stated above, we will allow the appeal and set aside the order of the High Court and will deal with the prayers in the statement of claim to make appropriate orders and directions to provide the relief.

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We hereby order so.

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